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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 493

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Statement

The Government's brief in opposition contains a rather lengthy alleged summary of the evidence developed at the trial and it justifies such departure from the issues of this proceeding by stating that the alleged summary is necessary in order to appraise the petitioner's contentions of error "in the light of the clear and convincing proof of his guilt."* Thus, the Government at the very outset indicates its intention to rely on the alleged over-

*See footnote, page 12 of brief in opposition.

whelming nature of the evidence and in effect, maintains that the necessity for a fair trial recedes as the evidence of guilt increases.

The petition and supporting brief, confining itself solely to the issues of law presented in this proceeding, did not treat of the facts of the case at any length (p. 2 Petition for Writ of Certiorari). It was assumed that the Government would try to show to this Court that the "extreme care needed to insure a fair trial" referred to by Judge Clark in his dissent in the Circuit Court below, had in fact been exercised.

As one reads the statement of facts which the Government presents as an alleged summary of the evidence, one is led to wonder how any judge of any Circuit Court of Appeals could possibly, after some eighteen weeks of study of the record, have stated:*

> "I feel I must say that, in my judgment, not only was guilt not overwhelming, but it was so doubtful that extreme care was needed to insure a fair trial."

and again:

> ". . . I must express my fear that defendant was tried and convicted of general amoral conduct, rather than of specific intent to defraud by mail."

The record shows that the Government has not presented a full and fair statement of facts from which this Court can justly appraise the petitioner's contention of multiple prejudicial errors. Even assuming *arguendo*, as does the Government, that this Court's decision on

* Minority opinion, pages 1675, 1677.

the numerous and repeated rulings will, in part, depend on the status of the evidence, it is manifest that the facts have not been presented to this Court in the Government's brief in opposition.

The Facts

The petitioner had been a commission agent for many years (p. 1580). For a time he had been connected with the fur business and later with various Stock Exchange houses. He secured customers for furs and received a commission. His services and favor were also sought after by stock brokerage firms, by reason of his connections with moneyed interests. These stock brokerage firms were most anxious to secure the lucrative business which petitioner controlled (pp. 728-9, 738, 746, 930-2).

At the trial the Government's testimony consisted largely of an attempt to prove the defrauding of one of those New York Stock Exchange firms, Stout & Co.,* whose partners were Messrs. Arthur Goetz and W. Hutton Miller.** These men, through their firm, had cashed for the defendant numerous checks drawn on the J. Feldman account at Petoskey, Michigan (p. 746). In most instances the funds to cover the checks issued were obtained by the cashing of other checks with the same firm and wiring that money forward to Petoskey, Michigan, for deposit. Petitioner was known to be a large business getter (p. 728). He had secured for the firm of Munds, Winslow & Potter, a prominent Stock Exchange firm,

* Stout & Co. was named as a victim and as part of the alleged scheme to defraud in the bill of particulars furnished by the Government to petitioner prior to trial (p. 14z). Any contention that Stout & Co. is not a part and a main part of the alleged scheme to defraud should be viewed in the light of this state of the record.

** Referred to hereafter as Hutton Miller.

commissions as high as $150,000 in a period of some fifteen months (p. 1309). This was during the year preceding his association with Stout & Co., and Stout & Co. was well aware of his business getting history and possibilities (pp. 746, 930-2, 949). Among some of petitioner's accounts were those of Fred and Larry Fisher, millionaire financiers and executives of General Motors (pp. 931, 1307-8).

One of the services to be rendered by Stout & Co. in return for petitioner obtaining business was the cashing of the checks in question and the advancing of money to him (pp. 740, 747, 749, 842). Direct payment of commissions would have been a violation of Stock Exchange rules (pp. 741, 1387). Petitioner was unable to become a customer's man and receive commissions directly, in accordance with the rules, because he had judgments outstanding against him and the necessary approval of the Stock Exchange was unlikely under those circumstances. Petitioner freely disclosed this situation to Stout & Co. (pp. 841-2). This was also the reason why he did not have his own bank account but used his father's account. This, too, was disclosed to Stout & Co. (p. 842).

It had been the practice of Stock Exchange firms to take temporary quarters in Florida during the winter season for the purpose of transacting business mainly with a view to making contacts which would remain permanently, and for the purpose of cementing relationships with old customers (pp. 1310-11). Petitioner had been active on behalf of Munds, Winslow & Potter, a New York Stock Exchange firm, during the winter season of 1937-1938 in Florida. After discussions between petitioner and the partners of Stout & Co. in the fall of 1938, it was decided that he would fulfill a similar function for

Stout & Co. during the winter season of 1938-1939 (pp. 949-951).

At Stout & Co.'s request, petitioner arranged for stock brokerage facilities at Miami Beach, consisting of three separate apartments on the boardwalk (p. 952). One was used as the main brokerage office of Stout & Co.; another, adjoining, but with a separate entrance, was used as petitioner's private apartment and as an exclusive suite for certain selected, important customers who did not wish to transact their business in the main office (pp. 938, 1432-1438). In these private quarters Stout & Co. installed a Translux (a modern projectionlike ticker tape arrangement) (pp. 787, 935). There was an inter-connecting telephone system direct to the main office next door for placing orders and obtaining market reports. Meals were prepared by a cook engaged by Stout & Co. and served to these special customers (pp. 955, 1436). Petitioner was supplied with a car and chauffeur by Stout & Co., in addition to his room and board (pp. 955, 1436, 1439). The third apartment was above the offices and was occupied by Hutton Miller and his wife during the winter season (p. 1433). Hutton Miller served as resident-partner of Stout & Co. in Florida for the winter season and petitioner's activities were carried on under his direction.

When the petitioner first became connected with Stout & Co. in New York (prior to the Florida season), his business was handled through a branch office at the Hotel Pierre (p. 747). A bank account was maintained by Stout & Co. at the Bank of New York, which was near the Pierre Hotel, mainly for the accommodation of petitioner in the cashing of his checks (pp. 740, 928). After a time, petitioner's business was transferred to the main office where it was handled directly by the partners, Messrs. Goetz and

Miller (pp. 748, 784). Around November of 1938, the advances of Stout & Co. to petitioner through the cashing of checks had reached the amount of some $12,000. Stout & Co. then paid petitioner $12,000 so that the outstanding checks could be cleared (pp. 784-5).

The check cashing accommodation continued after that payment (p. 785). By the end of December, the amount advanced to petitioner had again reached a substantial sum (p. 786). Petitioner at that time went to Miami Beach to participate in Stout & Co.'s winter business season (p. 785). He left in the possession of Arthur Goetz, the senior partner of Stout & Co., a batch of checks signed by J. Feldman, payable to the order of Sam Feldman, and endorsed by him. The amounts and the dates on the checks were blank. Goetz then from time to time, in New York, in petitioner's absence, filled in the amounts and the dates, cashed the checks and wired the money forward to Petoskey, Michigan, for deposit to cover checks petitioner had previously issued, which had not yet cleared. For a period, Goetz wired forward almost every day the sum of $6,000, after having first filled in and cashed Feldman checks in that amount (pp. 795-9). Stout & Co. advanced the Western Union charges for the wiring forward of the cash.

After petitioner had been in Florida for some time, Stout & Co. wired sufficient funds to him in Miami to take care of the checks cashed in New York, which were en route to Michigan (p. 785). Petitioner wired this money from Florida to Michigan and further check cashing was then handled directly by petitioner and the Stout partner, Hutton Miller at Miami (pp. 795, 785). The advances during petitioner's association with Stout & Co. had reached $36,000 by this time (p. 794). Inasmuch as peti-

tioner could have no official connection with Stout & Co., it was arranged that he should give Stout & Co. a note for $36,000, payable to Royal Miller, the father of Hutton Miller, who actually had had nothing to do with the transaction and had no connection with Stout & Co. (p. 969). Obviously the matter was handled in this manner so that the firm's name would be kept out of it.

During the winter season, while petitioner was in Florida, the practice had been for petitioner to give the checks to Dornbach, the chauffeur (pp. 1446-7), who would take them to the resident partner Hutton Miller for the Stout & Co. endorsement. Dornbach would then cash the checks at the Miami Beach Bank where Stout & Co. had its account (pp. 1441-3). At times the entire proceeds of the checks would be wired forward to Petoskey, Michigan, and at other times part would be wired and the balance returned to petitioner in cash.

Hutton Miller was fully aware of the exact nature and purpose of the check cashing (pp. 1421-3).

After petitioner returned to New York, a few days before the Stout & Co. office closed for the season, there was a substantial amount of checks outstanding en route to Michigan which had to be covered. Petitioner left checks signed in blank with the Stout & Co. Miami office for this purpose (pp. 1445-6). The resident partner, Miller, and the manager, Landau, filled in the amounts and wired the money forward to Michigan in petitioner's absence (pp. 1440-45).

On one occasion, because of the large amount involved, the Miami Bank refused to cash petitioner's check; but then agreed to cash it, if it were split up into two smaller checks equalling the same amount. Miller and Landau arranged it that way (pp. 1444-5).

Goetz, the partner who remained in New York, later used threats to force Miller to personally assume the resultant loss so that the Stock Exchange would not become aware of what the firm had done (pp. 924-5). Despite this precaution, the fact is that subsequently an investigation was conducted by a committee of the Stock Exchange (pp. 934-5). During the course of this investigation, it was found that petitioner enjoyed many unusual services from Stout & Co. including the check cashing privileges. Both Goetz and Miller were severely censured. The language used by the committee is direct refutation of the Government's theory, viz., that Stout & Co. was a victim (958), and the committee, saying that more serious action, such as suspension, was not being taken because the public had not been hurt in any way, added:

> "The Committee wishes to make it very clear to you, Mr. Miller, that they consider the practice that you allowed to go on in your office to be, to say the least, most reprehensible. This is the sort of practice that we will not tolerate and we mean to stop it" (pp. 957-8).

From the testimony of the Government's own witnesses at the trial, therefore, it must be apparent that the check cashing activities were part of a business arrangement between Stout & Co. and petitioner. Stout & Co.'s full knowledge and awareness, as well as active, knowing participation in the transactions for their own business ends, removes from these transactions any semblance of fraud as to them—the alleged victims.

Essex House Transaction

The rest of the Government's case to prove an a. ed scheme to defraud consisted of another incident c mencing in January, 1937 and ending in August, 193. This transaction bore no relationship to the Stout & Co. matter, and in fact occurred well over a year prior thereto.

In the Essex House situation, the Government's statement of facts would convey the impression that petitioner, a stranger, sauntered up to the desk of the hotel, cashed a large check and then continued to almost daily cash his checks there so that over a period of a few months he received some $800,000 thereby. It is apparent that the underlying basis of the dealings and transactions between the petitioner and Essex House has been omitted from the Government's statement. Petitioner, in 1937, was a tenant at the Essex House (p. 520). Moreover, it is obvious that neither the defendant nor any other guest could have cashed $800,000 in checks at the hotel over a period of months if the relationship existing between the hotel and the defendant were merely that of innkeeper and guest.

The cashing of the checks was done with the consent of the credit manager of the hotel, who was not charged in any way with being an accomplice; he was entirely familiar with the defendant's practice of wiring money forward to cover checks previously cashed (pp. 459-460). Feldman had done business favors for the Essex House and was, in fact, personally friendly with and had made check cashing arrangements with its operating trustee (pp. 536-537). The management at the time of the check cashing was fully aware of petitioner's poor financial condition (pp. 626-8, 632-3). The top ranking officials of the Essex

House were not unaware of the purpose for which the checks were being cashed by petitioner (pp. 508, 556-7). The credit manager knew that the money was being wired forward to cover other checks previously cashed by the hotel* (p. 460). Even Western Union knew that the checks were being cashed to provide funds to cover previously cashed checks (p. 377). The Government's witness Erb (alleged to be a victim) himself wired forward money for the cashing of these checks and signed the defendant's name to the money orders (p. 401). Most significant is the fact that the impressed fund maintained by the Essex House for the purpose of cashing checks of guests was $7,000 higher than generally required for its normal purpose—this, in order to accommodate the defendant (pp. 1281-2).

In view of that situation, which the Government has not disclosed to this Court in its statement of facts, it is not surprising that Judge Clark, in his dissent below, stated that the affirmative evidence of knowledge of the alleged victims was strong and further said:

> "Certainly agents of the Essex House had it (knowledge) and the only question here is how far the higher-ups in that organization remained in ignorance notwithstanding the sizeable amounts of these daily transactions" (pp. 1675-6). (Matter in parentheses ours.)

At page 10 of the Government's brief, it is made to appear that the "discovery" by the Essex House of the defendant's check kiting activities occurred in August of 1937 and that they then stopped the further cashing of

*The Government has evidently overlooked this part of the record when it stated, at page 9 of its brief, that Little, the credit manager, was unaware of the alleged "kiting."

checks. This is misleading, for the record clearly indicates that both before and throughout the entire period of time that the Essex House was cashing the defendant's checks, it was also the holder of an unsatisfied and uncollected judgment against the defendant for room rent and services and that it had been unsuccessful in its attempt to collect from the defendant even that small judgment (pp. 626-640). The Essex House then was cashing daily huge checks for the defendant with full knowledge that he was without funds (p. 639). The fact is that the Essex House refused to continue the accommodation of check cashing to the defendant only after there had been a change in ownership and management (p. 492). At that time the defendant was requested to take care of the outstanding checks, which he did, and the Essex House did not incur any loss in these transactions (p. 500).

In brief, the record is replete with testimony adduced by the *Government itself* that there was not the slightest effort by the defendant to conceal his intent and purpose from any one connected with Essex House. Moreover, the Government's evidence affirmatively shows that Essex House, its credit manager, its operating trustee and everybody in authority there involved not only knew that the checks which were cashed daily did not have supporting funds behind them, but they themselves willingly and knowingly participated in aiding the "kite" by cashing additional checks and wiring forward moneys to meet checks they previously had cashed.

Reynolds Transaction

At the trial, the Government tried to establish an alleged fraud in the borrowing of $32,000 from one Edwin S. Reynolds, Jr. in 1937 for which Feldman gave Reynolds

notes in this sum (Exhibits 86 and N; pp. 1580-1, 1624-5). The Government's position apparently is that there was fraud involved inasmuch as Reynolds had sent petitioner checks in blank drawn on Reynolds' bank account and petitioner had filled in the amounts and cashed the checks. Reynolds was named as a victim and was not in any way indicated to be an accomplice (pp. 10-14; 14Z). Feldman had cashed these checks with Reynolds' knowledge and consent (pp. 1318-20). Feldman believed Reynolds, the president of a prominent mid-western corporation, to be a wealthy man who dabbled in the market as a diversion and lived in luxurious fashion (pp. 597, 1315-1316).

The return of the Reynolds checks for lack of funds came as a surprise to Feldman. In fact, before Reynolds' checks were cashed for Feldman by Munds, Winslow & Potter, Mr. Allen, the managing partner of this prominent firm, communicated with Reynolds at Dayton, Ohio (pp. 1318-20). Reynolds was informed of the amount of the check and was told that petitioner was going to be given the cash (pp. 1318-20). The transaction was not completed until Reynolds said it was all right to go ahead (p. 1319). Feldman gave two promissory notes to cover the money advanced by Reynolds (Govts. Exhibit 86, Defendant's Exhibit N). One note for $12,000 was subsequently paid by Feldman who received the note back (pp. 1410-1). Some payments were made by Feldman on the other note (pp. 1414-6). Although petitioner was alleged to have defrauded Reynolds, the proof showed that Feldman and Reynolds remained warm friends to the time of Reynolds' death and Feldman was regarded as one of Reynolds' closest intimates (pp. 1414, 1416-7). Reynolds himself, as opposed to the Government's conten-

tion of fraud, had stated on occasion that the entire transaction was a loan (p. 1414).

With respect to the Reynolds transaction, Judge Clark stated:

> "As to Reynolds, defendant appealed to him for checks signed in blank, in order to get out of the jam he was in and Reynolds naively complied. What would he have signed the checks for except that they might be used to bolster defendant's shaky financial condition? Perhaps, here, too, there was evidence for the jury, although it points more in the direction of a violation of agency instructions than an intent to defraud by mail. At any rate, the evidence being thus equivocal, errors in the trial become the more important" (p. 1676).

The record is abundantly clear that the Reynolds transaction involved no fraud of any kind. It was merely the case of a friend advancing or attempting to advance some money to help out a friend. That this attempt to help created some hardship for the volunteer did not make the defendant's conduct fraudulent.

Appraisal of the Evidence

It thus appears that in the Stout & Co. and Essex House transactions, around which the Government's case is built, there was present the element of complete knowledge and awareness on the part of all parties concerned. By knowledge, we mean knowledge that the very checks that the parties were cashing for the defendant were at that time without funds behind them; knowledge that previously issued checks were being paid through the cashing of additional ones; knowledge that, unless the parties

would cash additional checks, the earlier ones could not be paid. In short, such knowledge as made each of the alleged victims a willing participant with the defendant in the transactions.

While the Government produced evidence of check kiting conducted and participated in by the petitioner and the so-called victims, this very evidence likewise established that the kiting *was not fraudulent* as to the alleged vistims. The evidence is unmistakably clear that the parties were either knowingly accommodating the petitioner (as in the Essex House and Reynolds situation) or that (as in the Stout & Co. case) there was a financial business arrangement involving the planned cashing of these checks as compensation to the petitioner for services being rendered.* Clearly, under these circumstances, the reference in the footnote at page 12 of the Government's brief as to the "clear and convincing" proof of the defendant's guilt can hardly be said to be a fair appraisal of the evidence and the dissenting judge's opinion below, wherein he states that the guilt of the defendant was "doubtful", must be given real consideration in weighing the prejudice resulting from the multiple erroneous rulings of the trial court.

* It is noteworthy that nowhere in the record does it appear that the petitioner was to receive any other thing of substantial value from Stout & Co. for his extensive services.

ARGUMENT (1)

The Government has failed to justify its contention that petitioner's constitutional right against self-incrimination has not been violated.

(Replying to Government's Argument 1, 1a and 1b)

In that part of the brief in opposition which deals with the violation of petitioner's constitutional right against self-incrimination by the admission into evidence in the Federal Trial Court below of his testimony in supplementary proceedings in the Supreme Court of the State of New York, taken on some ten occasions over a period of four years in four independent actions, the Government, while relying on the decision of the majority of the Circuit Court below that the evidence was admissible, has completely jettisoned the reasoning therefor of both that Circuit Court and of the United States Attorney.* Furthermore, the Solicitor General in a last minute effort to avoid review by this Court, takes the position that the result achieved by the majority below was in accord with the well established and controlling law and that the violation of the Fifth Amendment is not squarely raised in the case at bar and that therefore there is no reason for this Court to grant a writ to review.

Recourse to the actual opinions of both the majority and the minority in the Circuit Court below shows that there is no well established or controlling law with respect to the problem herein raised.

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*It is interesting to note that even the majority in the Circuit Court below were unconvinced by the arguments advanced by the United States Attorney there and attempted to support the admissibility of this testimony on a theory evolved subsequent to the argument. In this Court the Solicitor General has abandoned all previous reasoning.

"No controlling authority has been cited for this proposition . . . . We are not convinced that this decision should control determination of the case at bar (referring to Clark *v.* State, 68 Fla. 433) . . . . It seems surprising that neither the researches of counsel nor those of this Court have uncovered any precise authority . . . ." (Majority Opinion)

"The question of use in the federal courts of defendant's examination in the state supplementary proceedings, absolutely privileged on a state prosecution, is, as the opinion shows, not settled." (Minority Opinion)

The foregoing quotations from the opinions of the Court below show quite clearly that the case at bar squarely raises the question of the violation of the petitioner's constitutional rights in a situation where the law is unsettled and where no precise authority exists. It would be difficult to find a case where a Circuit Court's opinion has more markedly (albeit impliedly) suggested that the constitutional issues herein involved should be passed upon and be finally adjudicated by this, the highest Court in the land.

Government's Theory

The brief in opposition divides the Government's argument as to the violation of the Fifth Amendment into two parts, one dealing with the supplementary proceedings testimony taken prior to March, 1938 and the other dealing with the supplementary proceedings testimony taken subsequent thereto.*

* An amendment to the immunity portion of the New York State Supplementary Proceedings Statute (Civil Practice Act, Section 789) became effective on March 14, 1938.

SUPP. PRO. TESTIMONY SUBSEQUENT TO MARCH, 1938

The Solicitor General argues that the testimony in the five supplementary proceedings examinations taken subsequent to March, 1938* were properly admitted at the trial (over objection and exception) because (a) that testimony was merely cumulative of testimony taken in the earlier supplementary proceedings and therefore was not prejudicial; (b) the petitioner must be charged with having waived his privilege against self-incrimination under the Fifth Amendment by reason of his testimony in the other and earlier supplementary proceedings examinations; and (c) such testimony was in any event admissible because, on its face, it did not include *all* the elements of the crime and was, therefore, not *per se* incriminating. The record alone disproves the first contention; the law invalidates the second; both the record and the law defeat the third.

The record shows that a vital part of the prosecutor's case at the trial consisted of proof that during 1938-1939 the petitioner allegedly "kited" many hundreds of thousands of dollars in checks by cashing them with Stout & Co., as a result of which it was claimed this company was defrauded of $81,000.**

The transactions with Stout & Co. did not commence until the fall of 1938 and the proof covered a period of time beginning in the fall of 1938 and ending in the

* Pages 1588, 1591, 1597, 1604, 1616.

** Whether Stout & Co. (a partnership) was a part of the scheme to defraud, as indicated by the indictment as amplified by the bill of particulars wherein it was named as a victim (p. 14z) or whether the transactions with Stout & Co. were in the nature of similar acts, as the Government now contends, is unimportant at this point because, in any event, no one reading the record can gainsay that the evidence presented as to Stout & Co., and the Judge's charge in connection therewith, made it a vital part of the proof presented to the jury for the purpose of convincing it that the defendant should be convicted of the crime charge in the indictment.

spring of 1939 (pp. 714-715, 852-855). The supplementary proceedings testimony taken prior to March, 1938 concerned the defendant's situation and conduct during and prior to 1936-1937* and obviously could not concern or relate to his situation or conduct with respect to 1938-1939, at which time he was involved with Stout & Co.

To establish the crime charged against the defendant as to Stout & Co., the Government attempted to—indeed had to—prove a fraudulent scheme on the petitioner's part to issue, and then have Stout & Co. cash, a large number of checks, as well as prove the petitioner's inability and lack of power *at that time* to have such checks paid upon their arrival at the bank on which they were drawn. Proof of all of these elements was necessary in order to sustain this phase of the Governments' case and a failure of proof as to any one of them would be fatal to the prosecution's position. The record discloses that essential evidence as to the petitioner's relations with Stout & Co., of his check "kiting" activities with them and of his inability and lack of power to pay the checks theretofore cashed with Stout & Co., was supplied by the defendant's compulsory testimony in supplementary proceedings taken subsequent to March, 1938.** It is patent on the face of this record that the 1938-1939 supplementary proceedings testimony concerning and relating to Stout & Co. could not be and were not cumulative of the supplementary proceedings testimony taken in 1936-1937, during which period the petitioner was active in connection with the Essex House and Reynolds transactions, and which latter period was well over a year prior to the inception of the Stout

* This was the period of time during which the defendant had transactions with Essex House and Reynolds.

** See Appendix hereto, pp. 39-44; to facilitate analysis we have appended therein illustrative portions of the supp. pro. testimony subsequent to March, 1938.

& Co. transactions and had no relation to them. Therefore the Government's contention that the violation of petitioner's rights under the Fifth Amendment should be overlooked by reason of the cumulative quality of the evidence admitted, must fail.

The Government also attempts to make use of the alleged cumulative quality of the supplementary proceedings examinations subsequent to March, 1938 by arguing that the petitioner waived his constitutional privilege under the Fifth Amendment with respect to that admittedly compulsory testimony* by reason of his having testified in certain supplementary proceedings in 1936-1937.

With respect to the 1938-1939 testimony, not only did it concern, as above indicated, transactions and conduct covering a different period of time from those treated in 1936-1937 examinations, but four out of the five examinations in 1938-1939 had been conducted pursuant to a civil judgment against the defendant in a case (*Moyer* v. *Feldman*)** entirely separate from and unconnected with the civil cases, *Hearst Hotels Corp.* v. *Feldman, Corwend Corp.* v. *Feldman, 58-59 Realty Corp.* v. *Feldman,*** pursuant to which the defendant had been examined in 1936 and 1937.

The government relies on Sec. 2276 of Vol. 8 of Wigmore's Treatise on *Evidence* (3rd Ed. 1940), for authority to the effect that there was a waiver of the constitutional privilege against self-incrimination as to the 1938-1939 testimony by reason of the 1936-1937 testi-

* As to this testimony, the Government concedes that the immunity statute of the State of New York was valid and complete after March, 1938, and that thereafter the defendant, as a subpoenaed party, had no choice but to comply with the subpoena and to answer the questions propounded.

** Pages 1597, 1604, 1591, 1588.

*** Pages 1613, 1133-1136, 1622, 1289, 1620, 1621, 1627, 1628, 1142-1147, 1578.

mony.* That section can give little comfort to the Government's position in view of the fact that, as shown above, the testimony was taken in different proceedings, related to transactions at other and different times, and was admitted in the trial court as evidence of fraud in the Stout & Co. transactions, whereas the 1936 and 1937 testimony referred to the defendant's transactions and conduct as bearing upon Essex House and Reynolds as alleged victims. Applying the test set forth in Wigmore's[2] treatise,** it is apparent that there was no waiver in the case at bar. If the Government's theory be correct, then once a debtor has testified in supplementary proceedings without raising his privilege against self-incrimination (assuming that such privilege existed at the time), he has forever debarred himself from raising that constitutional privilege in subsequent examinations in different proceedings, even though the subsequent and different examinations relate to other facts, situations and crimes. The fallacy of this theory is apparent on its face. If there had been a waiver it could operate only as to the transactions which the earlier testimony directly concerned and it could not operate *in futuro* as to different facts, different situations and different alleged illegal acts.

The final argument of the Government as to the compulsory supplementary proceedings testimony taken subsequent to March, 1938 is that these examinations did not clearly on their face contain *all* of the elements of a

* See footnote at page 15 of government's brief.

** In order to have a waiver operate, not only must the later and other examinations refer and relate to the same transactions and alleged illegal acts but the waiver "is limited to the *particular proceeding* (italics ours) in which he thus volunteers testimony." 8 Wigmore on *Evidence* (3rd Ed. 1940) Section 2276, pages 450-451. In the case at bar there were, as seen above, four different particular proceedings.

crime and, therefore, not being *per se* wholly incriminating, the defendant could not receive the protection of the immunity statute of the State of New York.*

The elements of the mail fraud scheme charged in the case at bar consisted of proof that the defendant had cashed checks with the alleged victims, 1) at a time when he had insufficient funds in the bank to clear those checks, 2) when he was without the means or resources to meet them, and 3) that he cashed additional later checks to provide the funds to meet the earlier ones. It is obvious from the excerpts of the 1938-1939 supplementary proceedings set forth in the Appendix hereto that those supplementary proceedings examinations were greatly prejudicial to the petitioner, highly relevant and most important to the prosecution's charge of a federal crime and, needless to say, were most incriminating. That same testimony was also most incriminating under various criminal statutes of the State of New York.**

That this type of testimony receives the protection of the constitutional privilege and accordingly of the immunity statute admits of no doubt. It is not necessary that each piece of testimony prove the entire crime.*** Moreover, the privilege against self-incrimination is not confined only to those instances where at least one of the

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*A person receives the protection of the New York State immunity statute by testifying in conformity with it and does not have to refuse to answer first to secure its protection. Section 789 C. P. A.; cf. *Dunham* v. *Ottinger*, 243 N. Y. 423 (1926) and *United States* v. *Monia*, 317 U. S. 424 (1943). Of course, it is clear that in any event a person testifying in the courts of the State of New York, is unable to claim a privilege as to incrimination under the federal law. (*Jack* v. *Kansas*, 199 U. S. 372 (1905)).

**See New York Consolidated Laws (Cahill), c. 41, Sections 921, 925, 932, 938, and New York Penal Law, Sec. 1292a.

***"Most criminal acts are made up of two or more subordinate facts, each essential to the completed crime . . . In all these instances, no one of the component facts constitutes of itself the crime, and yet every one of them must be established in order ot establish the crime. It is therefore obvious that unless the privilege is to remain an empty formula easily evaded, its protection must extend to each one of these facts taken separately, as well as to the general whole." 8 Wigmore, *Evidence* (3rd Ed. 1940) Section 2260.

definite elements of a crime is the subject of the testimony. As was said by Learned Hand, J., in *United States* v. *Weisman*, 111 Fed. 2nd 260 (C. C. A. 2nd 1940) at page 262:

> "All crimes are composed of definite elements, and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached . . . ."

A fortiori, in the case at bar, where the supplementary proceedings testimony of 1938 and 1939 supplied *several* of the vital elements of the crime in the Stout & Company matter under federal law, as well as under state law, there can be no doubt as to the incriminatory nature of the testimony. Accordingly, this portion of the Government's claimed justification falls of its own weight.

The prosecution has therefore signally failed to prove that no violation of the Fifth Amendment occurred by reason of the admission of the supplementary proceedings subsequent to March, 1938. The admission into evidence of those five prejudicial supplementary proceedings examinations must, standing alone, result in a reversal of this conviction.

Supp. Pro. Testimony Prior to March, 1938

Even as to the supplementary proceedings testimony taken prior to March, 1938 and admitted into evidence in the District Court below over petitioner's objections, it is well settled law that at the time he gave that testimony pursuant to subpoena in the State court, the petitioner could not raise a privilege against self-incrimina-

tion under the Fifth Amendment in that his testimony might incriminate him under the federal law. *Dunham* v. *Ottinger, supra.* It can hardly be argued that there was a waiver of that privilege by the petitioner at the time he testified in the state court, in view of the fact that he had no federal privilege at that time, and the mere raising of it would have been a futile gesture. Equally invalid is any contention that if the petitioner might have raised a state privilege (under the then form of state immunity statute) as to the 1936-1937 testimony and failed to do so, he thereby waived a federal privilege which he did not at that time have.

The 1936-1937 supplementary proceedings examinations were taken pursuant to the laws of the State of New York and particularly the supplementary proceedings statutes (Article 45, Sections 773-792, New York Civil Practice Act). The attendance of petitioner at those examinations was compulsory. He was required to answer the questions put to him and he was forced to give answers even though those answers might incriminate him under a federal statute. *Jack* v. *Kansas* (*supra*).

In its brief in opposition, the Government has interjected the question of the validity of that portion of the supplementary proceedings statute which refers specifically to the immunity given in the State of New York. That immunity statute, valid or invalid, could, of course, give no immunity in the federal court. Any protection that the defendant might have against incrimination under the federal law would arise out of his rights under the Fifth Amendment; and under *Jack* v. *Kansas* (*supra*) that right did not exist and could not be raised in the state court. Accordingly, the first time that the petitioner could avail himself of the protection of the Fifth Amend-

ment was when the testimony was offered against him in the trial court below, and at that time he did seek that protection in no uncertain terms.

Whatever the effect of the validity or the partial validity of the New York State immunity statute (or for that matter the entire absence of any immunity statute) might have on the privilege of the defendant to refuse to answer questions in supplementary proceedings, the answers to which might incriminate him under a New York State law, that question is entirely irrelevant here. The sole issue in the case at bar, even as to the 1936-1937 testimony, is whether petitioner, who had theretofore been subpoenaed under the laws of New York State and had pursuant thereto given testimony under oath which incriminated him under the federal law (and at the time of testifying he had no privilege to refuse to answer on the ground of incrimination under the federal law) is unable nevertheless to avail himself of the protection of the Fifth Amendment when that testimony is subsequently offered against him in the federal court. The problem is simply one of whether, as the minority analyzed it in the court below, a person is to be trapped between the "interstices" of overlapping state and federal sovereignties.

The government, in an effort to circumvent the basic issues here at stake, has attempted to bring the situation here within the doctrine of *Wilson* v. *United States*, 162 U. S. 613 (1896).*

The *Wilson* case was one where the defendant had given a voluntary statement, not under oath, to the United States Commissioner, and that statement was subsequently used in his trial in the United States court. At the time that the statement was given, the petitioner there

* See brief in opposition at page 17.

could have raised his constitutional privilege under the Fifth Amendment, but failed to do so. The statement itself was finally admitted in the federal court and there was no question of overlapping and different jurisdictions, nor of the absence of an exercisable federal privilege at the time the statement was originally made. *Wilson* v. *United States* is merely declaratory of the well established law that a person who *has* a privilege that *can* be exercised but nevertheless *fails* to exercise it, *waives* it. Indeed, on the precise facts of the *Wilson* case, it is one dealing with the voluntary nature of a confession rather than with a waiver under the Fifth Amendment.

Be that as it may, however, the *Wilson* decision is in no way determinative of the case at bar which involves the problem of overlapping jurisdictions. This Court, in *Jack* v. *Kansas, supra,* at page 382, said that it did not believe that the evidence obtained compulsorily in the state court would be used in the federal court, and the defendant was, therefore, directed to answer the questions in the state court. The case at bar presents the situation where that which this Court believed would never happen has, in fact, happened. Any contention that *Wilson* v. *United States, supra,* or cases of its type are determinative of the question in the case at bar, is patently unsound.

THE SUPP. PRO. EXAMINATIONS WERE "TESTIMONIAL"

The Government finally claims that the case at bar does not involve self-incrimination under the Fifth Amendment, because the supplementary proceedings testimony is not "testimonial" in nature. It is true that the protection of the Fifth Amendment extends to "testimonial" matters only, but by no stretch of the imagination can

the sworn testimony of the petitioner, pursuant to subpoena of a court of record of the State of New York be considered anything other than "testimony".

The Government relies upon the authority of a group of cases dealing with books, records and reports. Not one of the cases cited at page 23 of the Government's brief on this point involves the use of "testimony" in its legal or accepted sense. Not one of them pertains to the sworn examination of a person testifying in court pursuant to a subpoena or legal process. Wigmore's Treatise on Evidence, in analyzing the "testimonial" protection given by the Fifth Amendment, says:

> "The privilege protects a person from any disclosure *sought by legal process against him as a witness.*"*

Johnson v. *United States*, cited at page 22 of the brief in opposition, and the other cases there cited are readily distinguishable from the instant case, in that they fall within the rule that:

> ". . . documents . . . obtained from the person's control *without the use of process against him as a witness* are not in the scope of the privilege. . . ."**

In *Ensign* v. *Pennsylvania*, 227 U. S. 592 (1913), cited by the Government at pages 18-19 of its brief, this Court, in defining "testimony", stated quite clearly that examinations under the Bankruptcy Act (similar in nature to sup-

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* 8 Wigmore (3rd Ed.), Section 2264, page 363.

** 8 Wigmore, *Evidence* (3rd Ed.), Section 2264, page 364. While it is not essential to petitioner's case, it is interesting to note that even as to books, records or chattels, there would be a violation of the Fifth Amendment if they were obtained from a defendant in response to a subpoena or other process treating him as a witness. Wigmore, same section.

plementary proceedings in a state court), were "testimony" (see p. 599). There this Court drew a sharp distinction between the examination of a debtor and his sworn bankruptcy schedules filed in court.

Does the Government seriously contend that had the testimony of the defendant in the supplementary proceedings been proven in the trial court below by the oral testimony of the attorney who had conducted the examinations or by the reading of the stenographic minutes thereof, the petitioner's rights would have been different? Does testimony become any less testimony because it has been transcribed on paper?

The Government finally seeks the assistance of precedents in cases involving statutory requirements that a person file reports with a public agency.* Their pertinence is allegedly justified by the lengthy quotation from Wigmore appearing in the same footnote. The very source of this quotation is the best refutation of its applicability to the instant case. That section (2259c) is entitled "Crime disclosed in (1) Public Books or (2) Books Required by Law to be Kept." The quoted excerpt is immediately preceded by this:

> "The same reasoning applies to records required by law to be kept by a citizen not being a public official, e.g. a druggist's report of liquor sales or a pawn broker's record of pledges. The only difference here is that the duty arises not from the person's general official status but from the *specific statute limited to a particular class of acts.*" (Italics ours.)

Obviously, then, by applying the analogy of the cited cases, the Government has attempted to remove the very

* See authorities cited in brief in opposition, page 23, footnote 30.

limitations on the application of the doctrine, so carefully fixed in the quoted section of Wigmore.

The effect of the attempted removal of the limits of the doctrine is best stated in *United States* v. *Mulligan*, 268 Fed. 893 (1920). Distinguishing between records or reports required as an incident to the privilege of engaging in enterprises regulated by statute, from testimony and private records, the Court there, at page 897, said:

> "The privilege and immunity of a citizen in his private affairs is carefully safeguarded and distinguished. . . . . Without such distinction of the rights of the individual in his private unregulated business from his status when engaged in business only by permission of the government and under government regulations, the safety of the nation might be in danger."

As a matter of fact, even as to reports required by governmental authority or agencies, such as income tax reports, it is doubtful whether a person could be required to set forth facts in such reports which would incriminate him (see *United States* v. *Sullivan*, 274 U. S. 257 (1927)).

In the case at bar, we are not dealing with books, records, chattels, reports or even documents. On the precise facts of the case at bar this Court's support of the Government's theory would establish the doctrine that a person's examination under oath, pursuant to subpoena of a court of record, is not "testimony". As well might it be said that the testimony of a defendant before a grand jury in violation of his constitutional rights against self-incrimination is, nevertheless, admissible against him at his trial, provided the minutes are transcribed and the typed document, rather than oral testimony concerning the same, is offered in evidence.

The Government's remaining argument that the compulsion, if any, in this case occurred in the state court, squarely raises the very issue which we ask this Court to rule upon, namely, whether testimony elicited from a person in a state court under the compulsion of legal process, which incriminates him federally, at a time when he is unable to raise his federal privilege, is admissible at his federal trial over his objection. It is respectfully submitted that this issue, involving basic civil rights under the Constitution, which has not heretofore been passed upon by this Court, and as to which the law in this country is at the very least, unsettled, should be settled by this Court.

ARGUMENT (2)

The deprivation of petitioner's right to cross-examine Stout & Co. was reversible error.

(Replying to Government's Argument 2a)

The dissenting judge in the Circuit Court below, referring to the testimony of Goetz and Miller, the Stout & Co. witnesses, stated:*

> "Hence cross-examination of these witnesses as to their prior statements, declarations and conduct was highly important and significant. Refusal to permit such examination was, therefore, clearly erroneous, as the opinion points out. In view of the importance of this evidence on the most vital issue of the case, I think this ruling alone would require reversal."

Despite this statement by an impartial judge who considered the record at great length, the Government, at

* Page 1676.

page 25 of its brief in opposition, attempts to disparage the effect and importance of the Stout & Co. testimony. While the Government emphasizes that no mailing was claimed in furtherance of the Stout & Co. transactions, it fails to mention the fact that Stout & Co. was specifically named as a victim in the bill of particulars and therefore was clearly designated by the Government to be a part of the specific scheme to defraud. Moreover, even if the Stout & Co. transactions were not part of the specific scheme, but were in the nature of a similar act, this alleged loss of $81,000, treated at length through some 288 pages of the record, involving the alleged kiting of many hundreds of thousands of dollars of checks, could hardly be said not to be a vital part of the evidence presented by the Government in an effort to secure a conviction of the crime charged.

What is even more interesting is the fact that the Government now abandons the considered judgment of both majority and minority below, admitting that the exclusion of the cross examination of Stout & Co. witnesses was error and contends here that the Circuit Court improvidently conceded such error. Evidently, the Government is not convinced that the error which occurred in the trial Court was without prejudice to the defendant and therefore it is forced to the position of trying to sustain the propriety of the exclusion of the cross examination, rather than to brush aside its effect and to argue that a wrong was done to this defendant but that he is without remedy.

Most of the rest of the Government's argument with respect to this matter is so palpably tenuous that it might well be disregarded. For instance, the Government draws attention to the fact that the trial Court gave the defendant some opportunity of cross examination on other mat-

ters. It is puzzling as well as surprising to find the Government thus contending, in effect, that since the defendant was not deprived of all cross examination on all issues, he should be satisfied with what he got, and be grateful for little favors.

The Government would have it appear that at some time a Government witness, on some unimportant occasion, may have said "There was no fraud" and that what defendant sought was merely an admission by the witness that he had previously made this remark or indulged in conduct indicating such an opinion. That simply is not so. Even a cursory reading of the portions of the record set forth in our petition and brief, as well as the comments made in both majority and minority opinions in the Circuit Court below, will disclose that the petitioner endeavored to ask a whole series of questions relating to the witnesses' prior statements, declarations and acts inconsistent with and contradictory to the substance of their direct testimony. These witnesses had been the main source of the Government's proof of a scheme to defraud Stout & Co., named in the bill of particulars as a victim. The length and importance of the Stout & Co. testimony is made readily apparent by reference to the detailed statement of facts appearing in this reply to the Government's brief in opposition.

The Government at this point in its brief (see pages 26, 27, brief in opposition), in effect, says:

> Inasmuch as proof of actual loss or defrauding is not necessary in order to establish a mail fraud scheme (citing Schauble *v.* United States and other cases), therefore any cross-examination relating to the loss or defrauding is immaterial.

Stated otherwise, although the Government had the right to produce any number of witnesses to prove loss and

the defrauding of each of them, the defendant had no right to cross-examine each one with a view to discrediting his specific direct testimony in that regard.

This contention is clearly untenable. The Government ignores the fact that throughout the three volumes of the record it did not overlook an opportunity to produce and stress testimony that hammered home to the jury the supposed *loss* sustained by the witnesses *and the fact that they were allegedly defrauded.* Even in the Government's brief in this Court, there are frequent statements to the effect that the proof was that Stout & Co., Essex House and Reynolds, the three alleged victims of the scheme, had actually been defrauded (see pp. 12 and 25, Government's brief in opposition). After the prosecution had saturated the record with alleged proof of loss and defrauding of victims, through the testimony of the alleged victims themselves, it would prevent an effort by the defendant to discredit these witnesses by showing that they themselves had previously, by their words, deeds and conduct, contradicted their testimony at the trial.

In its brief in opposition, the Government relies on cases which, in substance, hold that as a basic matter, the offense had been proven when there has been shown a scheme to defraud. With this proposition we have no quarrel. However, in the case at bar, as in most cases under the Mail Fraud Statute, the Government was permitted to prove alleged actual defrauding and actual resultant loss. This was in accordance with the practice of prosecutors under this type of statute (for example, see opinion L. Hand, J., in *Brown* v. *United States*, 79 Fed. (2nd) 321, 324 (C.C.A. 2nd 1935). Indeed, any attempt by a defendant to limit the Government to mere proof of a scheme to defraud and to prevent the Govern-

ment from proving the actual loss and defrauding, has always been strenuously resisted by the United States Attorneys and the Courts have sustained the prosecutors in that position (for example, see the Government's brief in the Circuit Court of Appeals for the Second Circuit, at pp. 57-9 in *Rice* v. *United States*, and the opinion of that case in 35 F. (2d) 689 (C.C.A. 2nd, 1929)). As a matter of law, in any case, whether it be mail fraud or any other charge, even if the direct testimony adduced by the Government of the Stout & Co. witnesses had been entirely immaterial and irrelevant in the first instance and accordingly inadmissible, nevertheless, since the Government had adduced such direct testimony, the defendant had the right to cross-examine with respect to it. (*Bogk* v. *Gassert*, 149 U. S. 17 (1893)).

The Government finally argues that the cross-examination would have served only to confuse and mislead the jury. We fail to see how the jury would be more confused by the cross-examination of these Government witnesses than it was as a result of their direct testimony on matters which the Government now admits were immaterial in the first instance.

In the light of this situation and the state of the record, it can hardly be asserted with any degree of validity, that the ruling of both the majority and the minority in the Circuit Court below that the restriction and prevention of this cross-examination was error, was "improvident".

ARGUMENT (3)

The Government has failed to justify the admission of the Emanuel transaction.

(Replying to Government's Argument 2b)

The Government has attempted to justify the admission of the testimony relating to Emanuel & Co. by claiming that these transactions were similar offenses to the one charged in the indictment. The essence of the charge stated in the indictment is a scheme to defraud by the "kiting" of checks and the use of the mails in furtherance thereof.

"Kiting", as defined by the Government's experts in the Trial Court below, consists of:

> "a scheme whereby checks are drawn against insufficient funds and the delay in clearing that check is taken advantage of by cashing a check within two or three days, whatever the clearance factor is, and wiring the proceeds to cover the earlier check before arriving at the bank for payment" (p. 1166).

There was no proof that "kiting" of any kind was involved in the Emanuel transaction. Clearly, therefore, it was not a similar transaction.

The Government's brief in opposition attempts by generalizations and omissions to give the impression that the Emanuel situation did involve "kiting". A consideration of the facts set forth in that brief leads to a conclusion opposite to that for which the Government contends. The Government refers to three drafts drawn by the defendant on one Heller. As to these drafts, the Government obviously infers that the defendant had been

"kiting" through Heller in the Emanuel transaction. In the first place, the record definitely shows that there was an interval of several months between each of the Heller drafts (p. 990). Thus, it was impossible to have used cash obtained from the second draft to pay the first. Besides, the first two of the three Heller drafts were in no way connected with or used in the Emanual transaction. Emanuel & Co.'s accountant, a Government witness, made a complete analysis of the defendant's account, and nowhere in this analysis (or in the rest of the record) can it be shown that these two drafts entered into the Emanuel transaction in any way (pp. 1059-1119). The third draft (the $50,000 one) was not a "kiting" transaction because its proceeds were not used to cover a previously cashed draft and because no subsequent worthless checks or drafts were cashed to pay it. The $50,000 draft was never met.

The Government finally relies on pages 1064-1080 of the record. This is an analysis of the defendant's account with Emanuel & Co. over a period of time. The most that can be said for this portion of the record is that it shows that at various times the defendant deposited for credit in his account with Emanuel & Co. various drafts some of which were good and some of which were bad, and from time to time he drew out various sums of money which had no relation in any way to drafts which had been previously deposited. Withdrawal of parts of a trader's equity from stock brokerage accounts is an established practice among traders and there was no semblance of irregularity connected therewith in the case at bar.

The history of the defendant's account, as shown by the record in the pages cited by the Government, is the best refutation of the Government's contention that this

was a similar transaction, *i.e.*, one involving "kiting". Nowhere in the Emanuel transaction does it appear that the defendant cashed checks or drafts which were worthless and wired or sent the cash forward to cover other worthless checks or drafts awaiting payment. A number of the drafts deposited by the defendant in the Emanuel account were returned dishonored, but the Government does not claim (nor does the record show) that these dishonored drafts "were made good" by check or draft "kiting" of any kind.

The only possible resemblance (not similarity) between the Emanuel transaction and the crime charged in the indictment is that in both situations instruments for the payment of money were involved. There, even the resemblance steps.

The quotation from *Kettenbach* v. *U. S.*, 202 Federal 377, 384 (CCA 9th, 1913) cert. den. 229 U. S. 613, cited at pages 28 and 29 of the brief in opposition, is incomplete and misleading. In the first place, it is not true that stock trading was the "only business that by his own admission petitioner ever had". The petitioner had for many years been a commission agent and was in the fur business (p. 1580). Obviously, therefore, the Government must fail in its attempt to bring this transaction within the quoted language of the *Kettenbach* case (*supra*) which refers to "similar transactions committed by the accused in the ordinary course of his business". In addition, the Government has failed to point out that the basis of the admission of the proffered testimony in the *Kettenbach* case was that "in all of which reports there was evidence of a uniform system of falsification as shown by the books of the bank, similar to the falsification of the reports which was charged in the indictment". *Kettenbach* v. *U. S.*, *supra*, at page 383.

In the case at bar even the Government does not claim that the Emanuel transaction presents a case of a *uniform* or *continuing system* of conduct; and the fact that some six or seven years before the alleged commission of the crime charged in the indictment a draft that the defendant gave was dishonored, in no way meets the test of admissibility set forth in the *Kettenbach* case cited by the Government.

While it is true that in a measure the application of the similar transaction rule rests in the sound discretion of the trial court, even the Government here does not contend that such discretion extends to the admission into evidence of a transaction both outdated (see majority and minority opinions in the Circuit Court below) and basically different and dissimilar.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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September, 1943.

APPENDIX*

We here set forth some selected questions and answers appearing in the supplementary proceedings testimony (after March 1938) concerning the period of the Stout & Co. transactions.

Testimony Concerning Relationship With Stout & Co.

(From examination in supplementary proceedings of July 20, 1939, page 1591, *et seq.* of record, Government's Exhibit 95):

Record Page

1591 Q. Where did you stay when you were in Florida? A. At El Mirasol Apartments.

1591 Q. Where? A. Miami Beach.

1591 Q. Did you keep an apartment there? A. I occupied a room.

* * *

1592 Q. Whose office was it? A. Stout & Co.

* * *

1592 Q. And who paid the rent for that room? A. It was given to me gratis.

1592 Q. By whom? A. By Stout & Co.

* * *

1592 Q. Who paid for your meals while you were in Florida? A. The firm paid all my expenses down there.

1592 Q. Which firm do you refer to? A. Stout & Co.

1592 Q. Were you employed by them? A. I was not.

1592 Q. Did you have any arrangement with them under which they paid for your room and board? A. I was there as a friend of Mr. Miller's.

1593 Q. Did you have any business transactions of any kind while you were in Florida from January first until you returned to New York City? A. None whatsoever.

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* Referred to in footnote, page 18 of this brief.

Appendix

(At the trial, defendant's position was that he had had business transactions with Stout & Co. in Florida, consisting of cashing of checks in return for services rendered. See page 4 of this brief.)

Testimony Concerning Check Transactions With Stout & Co. and Forwarding of Deposits to Meet Checks

(From examination in supplementary proceedings of December 16, 1938, page 1588 *et seq.* of record, Government's Exhibit 95):

* * * * *

1589 Q. Do you make any deposits in that bank (First National Bank of Petosky; Michigan) in your father's account? A. I do not.

1589 Q. Have you ever made any deposits in that account? A. Never.

(From examination in supplementary proceedings of July 20, 1939 p. 1591 *et seq.* of record, Government's Exhibit 95):

1594 Q. Have you ever sent money to anybody for the purpose of being deposited by them in J. Feldman's account of Petosky, Michigan? A. Not for quite some time.

* * * *

1594 Q. When was the last time anybody sent any money to Petosky to be deposited in J. Feldman's account? A. I think money was sent to Petosky when my father was in the city.

* * * *

1594 Q. Have you ever within the last two months sent money to the Bank in Petosky for deposit with them in the account of J. Feldman? A. Never.

1594 Q. Do you know of any other person who sent money to the Bank at Petosky or to any other person for deposit in the Bank at Petosky? A. No.

(This testimony relates directly to the period of time when defendant was dealing with Stout & Co. and likewise covers an important element in the crime with which the defendant was charged, to wit, the forwarding of deposits to meet checks.)

• • •

1595 Q. Have you ever asked persons you were doing business with to send money to the Bank in Petosky? A. No.

1595 Q. Have you ever asked people you were doing business with to send money to persons in Petosky? A. No.

(Compare this testimony with the testimony of Goetz and Miller, pages 795-9 and 1440-6 wherein they say that at the identical time here involved both the defendant and the witnesses were sending money directly to the Bank and to other persons in Petosky, Michigan, for deposit in the Bank there to meet checks previously cashed.)

• • •

1595 Q. Have you ever cashed a check in New York City drawn on the Bank in Petosky, Michigan? A. Issued by who?

1595 Q. By anybody. A. Yes.

• • •

1595 Q. How long ago did you cash the last check? A. Over two years ago.

(This testimony involves the cashing of checks during the period of Stout & Co. transactions at a time when, as appears hereinafter, defendant was penniless.)

Appendix

(From examination in supplementary proceedings of September 29, 1939 page 1604, *et seq.*, of record, Government's Exhibit 95-B):

* * *

1606 Q. Have you ever made deposits in the account of J. Feldman in the First National Bank? A. Never made a deposit.

1606 Q. Have you ever caused a deposit to be made in that account through the medium of another person? A. Yes.

* * *

1607 Q. I take it then that you forwarded money or checks or negotiable paper of some sort to J. Feldman of Petosky, by him to be deposited in the account of J. Feldman, is that correct? A. Yes.

Testimony Concerning Inability of Petitioner to Meet Checks Cashed with Stout & Co.

(From examination in supplementary proceedings of December 16, 1938 pages 1588 *et seq.*, of record, Government's Exhibit 95):

1588 Q. Is it a fact that you have been subsisting entirely on moneys sent you by your father? A. Of late, yes.

1588 Q. When you say of late, what period of time does that cover? A. Within the last year and a half.

1588 Q. Would it include the entire period when you were a resident at the Essex House and Navarro Hotel? A. No, because I was making money up until two years ago.

* * *

1589 Q. Do you maintain in your own name any brokerage account at the present time in any brokerage house whatsoever? A. No.

(From examination in supplementary proceedings of July 20, 1939 page 1591 *et seq.* of record, Government's Exhibit 95):

1594 Q. When was the last time that you got money of any kind from anybody? About how long ago? A. Way long ago. To the best of my recollection, probably a year or so, maybe longer.

1594 Q. Do I understand you correctly to tell me that you have not received money of any kind from any source for a period of a year? A. Outside of help.

1594 Q. What help did you get? When and from whom? A. Most of my help was from different members of my family.

(From examination in supplementary proceedings of October 26, 1938, page 1598, *et seq.* Government's Exhibit 95-A):

1599 Q. Have you a bank account? A. I have none.

* * *

1599 Q. Do you now maintain a brokerage account in New York? A. I have none.

* * *

1599 Q. What is the nature of your business? A. Selling my father's raw furs which he ships into the city. Also selling manufactured products to individual customers.

1599 Q. You are what is called a fur broker? A. Right.

* * *

1600 Q. Are there any moneys due from customers to you? A. Haven't been able to do any business for eight months.

1602 Q. Is there anybody who owes you money? A. Nobody.

(This testimony was taken at the very time defendant was cashing checks with Stout & Co. in New York.)

(From examination in supplementary proceedings of September 29, 1939, page 1604, *et seq.* of record, Government's Exhibit 95-B):

1604-5 Q. So that for the entire duration of this examination, which is approximately one and a half years or thereabouts that (money sent by his father) has been the sole source of your income? A. I don't recall that. I told you as time went along what my income was. The records will show it. I have no record of anything at the present time. (Matter in parentheses ours.)

(From examination in supplementary proceedings of September 6, 1939, page 1616 of record, Government's Exhibit 101):

1619 Q. Did you file an Income Tax return for 1938? A. Yes.

1619 Q. What earnings did you list? A. None.

(How could the Government more clearly and prejudicially prove the defendant's lack of means at the time he was cashing large checks with Stout & Co.?)